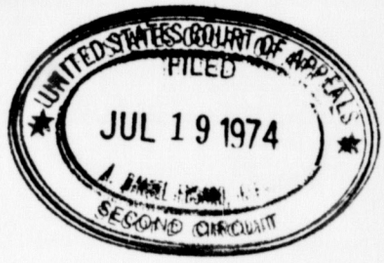
United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

74-1682



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN WESLEY RALLS,	:	
Petitioner-Appellee	:	DOCKET NO. 74-1682
vs.	:	
JOHN R. MANSON, Commissioner of Corrections for the State of Connecticut,	:	SUGGESTION FOR EN BANC CONSIDERATION UNDER RULE 35(b), RULES OF APPELLATE PROCEDURE
Respondent-Appellant	:	

Petitioner-appellee Ralls respectfully suggests that this Court reconsider en banc the appeal herein for the reasons that (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; and (2) the proceeding involves a question of exceptional importance.

Respectfully submitted,

PETITIONER-APPELLEE RALLS

BY: Morton P. Cohen / David S. Golub

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN WESLEY RALLS,	:	
Petitioner-Appellee	:	DOCKET NO. 74-1682
vs.	:	
JOHN R. MANSON, Commissioner of Corrections for the State of Connecticut,	:	MEMORANDUM IN SUPPORT OF SUGGESTION FOR EN BANC CONSIDERATION
Respondent-Appellant	:	

As Chief Justice Kaufman indicated in granting appellant's earlier motion herein for an expedited appeal, this matter presents issues of substantial importance, specifically, whether criminal appellants in state appeals are obligated to endure years of state appellate delay without possible remedy by way of federal habeas corpus relief for claimed violations of federal constitutional rights. The district court, per Blumenfeld, J., held that after three and one half years of unjustified appellate delay the exercise of federal jurisdiction was appropriate and indeed constitutionally mandated to vindicate federal constitutional rights. This court, in a per curiam decision, reversed and dismissed the petition herein.

Petitioner-appellee Ralls was convicted in Connecticut state court in November, 1970, of murder in the second degree and initiated appellate proceedings in December, 1970. To date, over three and one half years later, this appeal has not been heard by the Connecticut state courts. Throughout this period, Ralls has remained incarcerated. The question before the district court below and before this Court on appeal is whether, in light of this state appellate delay, an available state remedy can be deemed to exist and bar, pursuant to 28 U.S.C. §2254(b), federal relief.

The district court below, after examining an uncontroverted statistical analysis of the Connecticut criminal appellate system, found inordinate delays in excess of eighteen months to be an inherent part of the process over 90 percent of the time.[1] On the basis of this finding, and in light of the circumstances of this case, the court held that the three and one half year delay in the completion of Ralls' state appeal rendered the state process "ineffective to protect the rights of the petitioner" within the context of §2254(b).[2] This holding was soundly supported by established precedents in this circuit and in other circuits.[3]

In this Court, only Judge Lumbard saw fit to consider the exhaustive findings by the district court as to the inherent deficiencies in the Connecticut appellate process. Observing that "the procedural history in this case shows not so much that the state prisoner has failed to exhaust

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[1] See United States District Court Memorandum of Decision, May 7, 1974, p. 16, in which the court also found that "the average length of time for a criminal appeal by a defendant was approximately thirty months." Id. Accordingly, the court concluded:

> The delay suffered by the petitioner in this case is not extraordinary. That does not make it any more justifiable. It is evident from the foregoing that criminal defendants appealing their convictions in the courts of Connecticut experience as a rule very lengthy delays in the appellate process. Id., at 19-20.

[2] Id., at 26.

[3] Way v. Crouse, 421 F.2d 145 (10 Cir. 1970); Tramel v. Idaho, 459 F.2d 57 (10 Cir. 1972); Dozie v. Cady, 430 F.2d 637 (7 Cir. 1970); Odsen v. Moore, 445 F.2d 806 (1 Cir. 1971); Barry v. Sigler, 373 F.2d 835 (8 Cir. 1967); United States ex rel. Graham v. Mancusi, 457 F.2d 463 (2 Cir. 1972); West v. Louisiana, 478 F.2d 1026 (5 Cir. 1973); Dixon v. Florida, 388 F.2d 424 (5 Cir. 1968); Smith v. Kansas, 356 F.2d 654 (10 Cir. 1966).

his remedies but rather that the pursuit of those remedies has exhausted him,"[4] Judge Lumbard indicated his agreement with the district court's conclusions:

> Apparently, the practice has been found to be a time-consuming, expensive and altogether archaic practice which puts an unnecessary burden on counsel and the trial judge, and results in inordinate delay.[5]

While Judge Lumbard did concur in the per curiam decision herein to reverse and dismiss Ralls' petition, his concurrence was based not on the exhaustion issue, but on a legal theory of federal habeas corpus relief never adopted by this Court, by courts of other circuits, or by the United States Supreme Court.[6]

As to the exhaustion issue, two judges on the original panel[7] disagreed with Judge Lumbard and the district court and held that no inordinate delay

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[4] See United States Court of Appeals for the Second Circuit slip opinion, #74-1682, July 5, 1974, p. 4702 (Lumbard, J., concurring).

[5] Id., at 4713 (Lumbard, J., concurring).

[6] Id., at 4702-3 (Lumbard, J., concurring), wherein Judge Lumbard argues that federal habeas corpus relief does not lie in the absence of claims going to the innocence of the petitioner. To the extent that it is necessary herein to answer Judge Lumbard's argument, it should be pointed out that contrary to his assertion, from first to last, Ralls has steadfastly maintained his innocence of the charge against him, and Ralls' claims, especially his claim of jury coercion, strike at the very heart of the validity of the guilty verdict rendered against him. Ralls is not merely raising alleged technical errors of law; rather, his claims, if substantiated, indicate a significant due process violation that adversely affected the fairness of his trial. Indeed, it seems most anomalous to argue that Ralls' guilt was overwhelmingly clear when it was, in fact, necessary to "dynamite" a deadlocked jury into a verdict.

Furthermore, the one court that has fully considered the merits of Ralls' appeal has concluded that there were sufficient constitutional defects at trial to vacate the jury's finding. It should be noted that appellee was not permitted to file a supplemental brief to this Court on the substantive issues of this appeal.

[7] In addition to Judge Lumbard, the original panel included the Honorable Circuit Judges Hays and Timbers.

sufficient to warrant federal intervention had occurred in this case. It is respectfully submitted that this conclusion was factually and legally erroneous and should not be allowed to stand on the law of this circuit.

Certainly, it is clear from established precedent that three and one half years is an inordinate period of appellate delay. In cases involving unjustifiable delay one-half as long, federal courts have seen the need to accept jurisdiction, pending state appeals notwithstanding. Way v. Crouse, 421 F.2d 145 (10 Cir. 1970) (18 months); Dozie v. Cady, 430 F.2d 637 (7 Cir. 1970) (17 months); see Tramel v. Idaho, 459 F.2d 57 (10 Cir. 1972) (3 years); Odsen v. Moore, 445 F.2d 806 (1 Cir. 1971) (34 months); cf., United States ex rel. Grahamm v. Mancusi, 457 F.2d 463 (2 Cir. 1973); Bartone v. United States, 375 U.S. 52, 54 (1963) ("Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceedings.") The per curiam decision neither cites nor distinguishes these irrefutable precedents relied on below, in reversing the lower court's decision to accept jurisdiction of the petition.

The Court concluded that the length of the state appellate delay notwithstanding, the alleged imminency of state resolution of Ralls' appeal makes the exercise of federal jurisdiction inappropriate. This conclusion is legally inaccurate and factually intolerable.

Ralls' federal petition was filed on October 17, 1973, thirty-four months after the commencement of the state appeal. At that time, the appeal record had not reached the Connecticut Supreme Court, briefs had not been filed, and the appeal had not been docketed. Assuming an orderly completion of these steps, anywhere from one to two years would probably have been required for completion of the state appeal.[8] On October 31, 1973, Ralls' state counsel moved, pursuant to §762, Connecticut Practice Book, to expedite the appeal, requesting permission to file typewritten briefs. This motion was opposed by the state's attorney on the ground that "the defendant has failed to cite an unusual delay in the appeal process."[9] The motion was denied by the Connecticut Supreme Court, which thereupon granted Ralls' unopposed request for a five month extension for completion and printing of his briefs.

On May 7, 1974, the district court accepted jurisdiction over Ralls' habeas petition and reversed his conviction. The state appealed to this Court and oral argument was set, on an expedited basis, for June 14, 1974. On the day of oral argument, counsel for the state informed the Court and opposing counsel that the Connecticut Supreme Court was about to publish an order,[10]

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[8]The record was received at the Connecticut Supreme Court on October 31, 1973. In the absence of extensions, briefs would be due approximately two months later, and thus, in January, 1974, the case would have been placed on the docket for oral argument. In the absence of any determination to expedite the appeal, the case would then follow those cases previously docketed before the court. As of February, 1973, there were, according to the clerk's office at the Connecticut Supreme Court, twenty-eight criminal appeals on the Connecticut Supreme Court docket. Since over the past three years, the court has decided less than twenty criminal appeals per year, it is therefore unlikely that Ralls' appeal would have been reached before 1975.

[9]See State's Memorandum of Opposition to [Appellant Ralls] Motion to File Typewritten Brief, included in Appendix herein at p. 112.

[10]The Order was, in fact, published on June 18, 1974, four days after oral argument. See State of Connecticut v. John Wesley Ralls, XXXV Conn. L.J. 51, pp 3-4 (6/18/74).

pursuant to the state's attorney's motion, expediting Ralls' state appeal. The state court's order was so new-born that appellant could not even furnish the Court with a written memorandum of the order.

Coming as it did on the very morning of oral argument, after the district court had already reversed Ralls' conviction, and in light of the state court's previous denial of Ralls' identical motion to expedite the state appeal (filed prior to the district court's opinion), the state court's action represents a clear and disrespectful attempt to influence the outcome of this appeal.

By condoning the state court's chicanery, the Court established an intolerable standard with respect to inordinate delay in Connecticut (where the issue is inevitably sharpened) and other states within this circuit. Should the per curiam decision be allowed to stand, the state courts will always be able to overturn on jurisdictional grounds an adverse substantive decision in a lower federal court by ordering, on the eve of federal appellate review, an expedited state proceeding. Equally important, the state court will also be able to shield from federal review, a constitutionally defective appellate system found "at best depressing and at worst intolerable."[11]

Furthermore, the state court's order is, at this point, legally irrelevant. The issue before the Court was not anddis not the appropriateness of federal jurisdiction as of July, 1974; rather this Court was and is called on to assess the validity of the district court's determination that,

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[11]United States District Court Memorandum of Opinion, op cit., p. 29.

as of October, 1973, the date of the filing of the federal petition, Belbin v. Picard, 454 F.2d 202, 204 (1 Cir. 1972), the state appeal had been inordinately delayed with no immediate completion foreseeable. Stated so, the rectitude of the district court decision is irrefutable. As of October, 1973, had the state appeal proceeded in an orderly fashion, it is likely that one to two more years would elapse prior to decision.[12] Even with an expedited process, over one year will elapse from the filing of the federal petition to completion of the state proceeding.[13]

It should also be pointed out that in each of the three cases cited by the court as authority for its disposition herein, the issue was whether substantive questions raised in the federal courts had previously been fairly presented in the state courts. Picard v. Conner, 404 U.S. 270 (1971); United States ex rel. Gibbs v. Zelker, ___F.2d___ (2d Cir. 1974), slip op. 2981 (April 23, 1974); United States ex rel. Nelson v. Zelker, 465 F.2d 1121 (2d Cir.), cert. denied, 409 U.S. 1045 (1972) In none of them was there a state appellate process even suggesting inordinate delay.

The per curiam opinion also hints, in footnote five, that Ralls may have available state remeides to expedite his state appeal, specifically, §§696 and 762 of the Connecticut Practice Book.[14] This suggestion, which does not appear to be actually adopted, is legally erroneous.

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[12] See n. 8, supra.

[13] Under the terms of the order expediting the state appeal, oral argument is scheduled in the state proceeding in October, 1974, with decision probably following, on the basis of past experience, approximately one month later.

[14] United States Court of Appeals for the Second Circuit slip opinion, op. cit., at 4701-2, n. 5.

Section 696 deals with "Lack of Diligence in Prosecution or Defending Appeal" and provides that if a party fails to defend an appeal with proper diligence, the Connecticut Supreme Court may set aside the judgment under attack. In the district court, appellant argued that Ralls' failure to pursue this remedy foreclosed federal jurisdiction.

This argument was rejected by the district court which held (1) that the delay in Ralls' appeal was inherent to the process and was not occasioned by lack of due diligence by the state;[15] (2) that the remedy was illusory, since it had never in its history been sustained as to serious criminal charges (especially given its most recent history, see State v. Roberson, 35 Conn. L. J. 9 [1/15/74]; State v. Annunziato, ___Conn. L. J.___ [12/4/73]); and (3) that Ralls was not, as a matter of law, required to seek collateral state remedies while his direct appeal is pending. Wilwording v. Swenson, 404 U.S. 250 (1971) ("Petitioners are not required to file repetitious applications in the state courts. Brown v. Allen, 344 U.S. 443, 449 n. 3 [1965]. Nor does the mere possibility of success in additional proceedings bar federal relief. Roberts v. LaValle, 389 U.S. 40, 42-3 [1967]; Coleman v. Marshall, 351 F.2d 285, 286 [6 Cir. 1965]); Picard v. Connor, 404 U.S. 270, 275 (1971).

Significantly, appellant did not, on appeal to this Court, contend that §696 provided an available and applicable remedy to the inordinate state

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[15] Of the three and one half year delay in completing the appeal, only eleven months are directly chargeable to the appellant (for extensions of time for the counterfinding). The remaining time, as the district court held, is directly attributable to the archaic requirements of the Connecticut appellate process and are inherent therein. See United States District Court Memorandum of Opinion, op. cit., at 15-20.

appellate delay herein. Accordingly, the section's belated resurrection by the Court is both surprising and legally erroneous.

Section 762 provides for suspension of state supreme court rules in order to expedite an appeal. Ralls' state counsel did, in fact, move, on October 31, 1973, pursuant to §762, to expedite the appeal, and this motion was denied, as discussed above. In the face of such denial, it can scarcely be contended that §762 offered an available remedy to the appellate delay.

The rule established herein by this Court that there must be a "... complete absence of effective state appellate process ..."[16] before federal jurisdiction may lie suggests that the possible existence of any arcane motion which might be successful forecloses federal jurisdiction. Such rule has not previously been adopted as a standard by any court, and it is respectfully urged that it is one which this Circuit should not adopt. Its adoption would mean, as the instant case demonstrates, that a state having a burdensome and inordinately delayed appellate process may prevent a state appellant from having his federal constitutional claims heard for years by requiring a series of motions before such appellant has completed his state appellate process. See Wilwording v. Swenson, 404 U.S. 250 (1971).(quoted above).

It is respectfully submitted that the Court's per curiam decision herein, is, therefore, legally erroneous, in conflict with precedent set forth by the United States Supreme Court, the Court of Appeals for the Second Circuit, and the remaining circuits, (1) in its holding that inordinate appellate delay

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[16]United States Court of Appeals for the Second Circuit slip opinion, op. cit., at 4701-2.

notwithstanding, there is no complete absence of effect state process; (2) in relying on the state court's order expediting the state appeal when such order was promulgated after the district court opinion had been rendered, on the eve of appellate argument to this Court, and after an earlier motion to expedite the appeal, filed prior to the district court's opinion was denied; (3) in seemingly indicating that available state remedies to challenge the delay exist, even though such remedies were not argued by the state herein, are inapplicable to the facts of this case, and are legally unnecessary.

Furthermore, it is respectfully urged that this case involves questions of overriding importance to the functioning of the Connecticut judicial system, questions which will arise repeatedly unless resolved at this time by this Court. Ultimately, what is most objectionable about the per curiam opinion is its total disregard for the exhaustive examination of the Connecticut appellate process undertaken by the district court and the district court's conclusions as to the inherent constitutional defects in that process. The inordinate Connecticut appellate delay found to exist, as a general rule, by the district court cannot be ignored, nor will it be corrected, until and unless this Court decides to review the district court's conclusions about the Connecticut appellate process.

WHEREFORE, it is respectfully suggested that this Court hold a rehearing en banc in the instant matter.

Respectfully submitted,
PETITIONER-APPELLEE RALLS

BY: Morton P. Cohen / David S. Golub
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DAVID S. GOLUB, ESQ.
His Attorneys

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed, postage prepaid, to JERROLD W. BARNETT, Assistant State's Attorney, Office of the Chief State's Attorney, 8 Lunar Drive, Woodbridge, Connecticut, this 18th day of July, 1974.

David S. Golub

DAVID S. GOLUB, ESQ.